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Congress of the United States
U.S. House of Representatives
Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515-6315

November 5, 2012

Ms. Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

RE: Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth In Lending Act (Regulation Z); Proposed Rule (Docket No. CFPB-2012-0028), 77 Fed. Reg. 51,116 (Aug. 23, 2012)

Dear Ms. Jackson:

On August 23, 2012, the Consumer Financial Protection Bureau (CFPB or Bureau) published a proposed rule[1] to integrate certain disclosures required under the Truth In Lending Act[2] (TILA) and Real Estate Settlement Procedures Act[3] (RESPA) that are provided to borrowers who are making residential real estate transactions. The CFPB was required to propose rules and model disclosure forms under sections 1032(f), 1098, and 1100A of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).[4]

I. TILA-RESPA Rulemaking Overview

The TILA-RESPA Rule will affect mortgage lenders (such as community banks and credit unions), mortgage brokers, mortgage companies and settlement service providers, the vast majority of which are small businesses. Because the CFPB determined that the TILA-RESPA Rule will have a "significant economic impact on a substantial number of small entities" under the Regulatory Flexibility Act, 5 U.S.C. §§ 601-12 (RFA), it was required to receive input directly from small businesses before proposing the rule and subsequently conducted an initial regulatory flexibility analysis (IRFA) of small business impacts.[5] The IRFA was published as part of the Proposed Rule.

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[1] 77 Fed. Reg. 51,116 (Aug. 23, 2012) ("TILA-RESPA Rule or Proposed Rule").
[2] 15 U.S.C. § 1601(a).
[3] 12 U.S.C. § 2601(a).
[4] Pub. L. No. 111-203, 124 Stat. 1376 (2010).
[5] 77 Fed. Reg. at 51,282. The CFPB was required by § 609 of the RFA to convene and chair a Small Business Advocacy Review (SBAR) panel to receive input from affected small businesses. Section 609(b) requires designated federal agencies to convene SBAR panels. Section 1100G of Dodd-Frank amended § 609(b) to add CFPB to the list of agencies. After conducting the SBAR panel process, the agency realized that its original assessment was correct—the

The Committee on Small Business (Committee) held a hearing on August 1, 2012 to examine concerns with the CFPB's analysis of small business impacts of the TILA-RESPA Rule at which CFPB Director Richard Cordray testified. Trade associations representing small businesses in the mortgage industry submitted letters for the record to the Committee that outlined their concerns with the Proposed Rule.

While the TILA-RESPA Rule is designed to protect consumers engaging in mortgage-financed real estate transactions, small businesses in the mortgage lending industry are concerned that some provisions of the Proposed Rule may have unintended negative consequences, such as increasing the opacity, complexity and costs of these transactions, which undermines CFPB's goal of protecting consumers. This comment letter reflects concerns that were raised in the letters for the record, or brought to the Committee's attention following the August 1, 2012 hearing, or from Committee staff analysis of the Proposed Rule.

II. Comments

In the context of a real estate transaction, TILA and RESPA require two different disclosure forms be provided to consumers three days after applying for a mortgage and two different disclosure forms be provided at or shortly before closing the real estate transaction. While it has long been recognized that the two sets of forms overlapped and used inconsistent terminology, attempts to consolidate and simplify the forms had largely been unsuccessful. The mortgage crisis, characterized by high-delinquency rates and foreclosures, focused Congress's attention on whether consumers were fully informed of and understood the terms of their loans. Under the Dodd-Frank Act, authority over TILA and RESPA was transferred to CFPB on July 21, 2011, and CFPB was required to propose both regulations and disclosure forms that integrate certain disclosures for public comment by July 21, 2012.[6]

CFPB is proposing to amend Regulation X[7] (RESPA) and Regulation Z[8] (TILA) to establish new disclosure requirements, as well as the forms in Regulation Z for most closed-end consumer credit transactions secured by real property.[9] The Proposed Rule will not apply to home-equity lines of credit, reverse mortgages, or mortgages secured by a mobile home or dwelling that is not attached to real property (land).[10]

The Dodd-Frank Act did not include a deadline for issuing a final rule and integrated mortgage disclosure forms. However, the Dodd-Frank Act did include a deadline, January 21, 2013, by which entities must comply with the new disclosure requirements for mortgage transactions found

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proposal would have a significant economic impact on a substantial number of small entities. Therefore, § 603 of the RFA required the agency to prepare an IRFA to assess the impact of the rule on small businesses. 77 Fed. Reg. at 51,283.

[6] *Id.* at §§ 1032(f), 1098, 1100A, 124 Stat. at 2007, 2103-04, 2107-09 (respectively).

[7] 12 C.F.R. Pt. 1024.

[8] 12 C.F.R. Pt. 1026.

[9] 77 Fed. Reg. at 51,116.

[10] *Id.* It also does not apply to loans made by a person who makes five or fewer mortgages in a year and is thus is not defined as a "creditor" under Regulation Z. *Id.*

in Title XIV of the Dodd-Frank Act.[11] CFPB has proposed delaying those requirements by temporarily exempting entities from the January 21, 2013 deadline until a final rule implementing the integrated TILA-RESPA disclosures takes effect.[12] The Committee endorses postponing compliance in order to avoid lender confusion thereby leading to borrower uncertainty which undermines the objective of the CFPB in this rulemaking to protect consumers by providing accurate and complete information.

The Committee commends the CFPB for recognizing and proposing a way to avoid this unnecessary burden; however, delay, by its nature, will not resolve all the concerns that the Committee has concerning the Proposed Rule. In the Committee's opinion, CFPB could have done more to examine alternatives that reduce burdens on small businesses involved in real estate transactions while still achieving the agency's objective of protecting consumers through complete and understandable disclosures.

a. All-In Finance Charge/Annual Percentage Rate (APR) (Proposed 12 C.F.R. § 1026.4)

As part of the regulatory proposal, the CFPB is proposing to redefine the way the finance charge and corresponding APR[13] is calculated and to do so will eliminate the current exclusions from the definition of "finance charge" under Regulation Z.[14] Changing the definition of "finance charge" is not required by the Dodd-Frank Act nor TILA. It was suggested by the Board of Governors of the Federal Reserve System (Federal Reserve Board) in their 2009 proposed rule to amend Regulation Z that was never finalized.[15] The Bureau states that changing the finance charge from a "some fees in, some fees out" approach to a more inclusive approach will "effectuate TILA's purpose by better informing consumers of the total cost of credit."[16] Furthermore, the CFPB states that "[t]his will make it easier for consumers to use the APR to compare loans and easier for industry to calculate the APR."[17] However, the CFPB's own research does not support this assertion.

Kleimann Communication Group, Inc., the firm hired by the Bureau to design and perform consumer testing of the integrated mortgage disclosure forms, reports that most consumers that

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[11] *Id.* at 51,133.
[12] *Id.*
[13] The APR is an interest rate calculation that is supposed to help consumer understand the total cost of the loan. It is "the finance charge expressed as an annualized rate that can be used to equate mathematically the stream of payments made over the life of the loan to its present value." BD. OF GOVERNORS OF THE FED. RESERVE SYS. AND UNITED STATES DEP'T OF HOUS. AND URBAN DEV., JOINT REPORT TO THE CONGRESS CONCERNING REFORM TO THE TRUTH IN LENDING ACT AND THE REAL ESTATE SETTLEMENT PROCEDURES ACT 7 (1998), *available at* http://www.federalreserve.gov/boarddocs/rptcongress/tila.pdf (hereinafter "HUD-Federal Reserve Joint Report"). Currently, "[t]he finance charge reflects the dollar amount of the cost of credit and includes interest and other costs such as origination fees, discount points, and private mortgage insurance." *Id.* The APR is not necessarily the par value of the interest rate of the loan, i.e., the APR may be higher or lower than the interest rate charged by the bank. *Id.* The distinction is not at all nefarious but results from simple arithmetic calculation. A consumer that pays an origination fee ("points") for the loan can incorporate that amount into the size of the loan. The interest rate on the value of the residence purchased stays the same but the total borrowed increases; simple math forces the value of the interest rate on the entire transaction to differ from that on just the residence.
[14] 77 Fed. Reg. at 51,117 and 51,143.
[15] *Id.* at 51,143.
[16] *Id.*
[17] *Id.* at 51,117.

participated in the testing found APR to be confusing and not useful in comparing loans.[18] The Kleimann Report notes that other studies conducted for the Federal Reserve Board and the Federal Trade Commission (FTC) have also found that consumers confuse APR with the loan's interest rate.[19] It is not clear how adding more charges, such as settlement costs, into the finance charge calculation will resolve this confusion.

Moreover, small lenders that participated in the SBAR panel process stated that including additional items in the APR calculation will cause APRs to be higher, resulting in more loans triggering the requirements for higher-priced loans, including escrowing taxes and insurance.[20] This is problematic for community banks that do not have the ability to create escrow accounts for taxes and insurance. Additionally, many consumers do not want those items to be escrowed.[21] Furthermore, small lenders believe that the software and training costs to make the proposed changes to the finance charge and APR calculations will be costly and those costs will be passed on to consumers.[22]

If the point of the CFPB proposal is to protect consumers, the modification clearly fails to do that while at the same time imposing unnecessary complications on small businesses to accurately reflect the APR. While it is important for the consumer to know the total cost and monthly cost of the loan, the Proposed Rule's emphasis on APR fails to accomplish that goal. Had the CFPB done a more perspicacious job in preparing its IRFA, it might have uncovered an alternative to the confusing APR that helps borrowers without imposing undue costs on businesses.[23]

b. Machine Readable Reporting Requirement (Proposed 12 C.F.R. § 1026.25)

The CFPB is proposing to amend § 1026.25 of Regulation Z to require that creditors retain the integrated disclosures in an "electronic, machine readable format."[24] This change is not required by TILA, RESPA or the Dodd-Frank Act. Currently, Regulation X and Z permit electronic recordkeeping but do not require it.[25] The Committee has been informed that presently creditors retain evidence of compliance with TILA and completed RESPA settlement statements and related documents in a variety of mediums including paper, microfiche, and computer-imaged (e.g., PDF) files.

In the proposed rule, the CFPB states that "image reproductions (e.g., PDF) or document text, such as those used by word processing programs, are not machine readable for the purposes of this

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[18] KLEIMANN COMMUNICATION GROUP, INC., KNOW BEFORE YOU OWE: EVOLUTION OF THE INTEGRATED TILA-RESPA DISCLOSURES 297, (July 9, 2012), *available at* http://www.regulations.gov/#!documentDetail;D=CFPB-2012-0028-0002 (hereinafter "Kleimann Report").
[19] *Id.* at 303.
[20] SMALL BUSINESS ADVOCACY REVIEW PANEL, FINAL REPORT ON CFPB'S PROPOSALS UNDER CONSIDERATION FOR INTEGRATION OF TILA AND RESPA MORTGAGE DISCLOSURE REQUIREMENTS 38 (2012), *available at* http://www.regulations.gov/#!documentDetail;D=CFPB-2012-0028-0003 (hereinafter "SBAR Panel Final Report").
[21] *Id.* at 39.
[22] *Id.* at 69, 72.
[23] For example, Ford Motor Company's website, when adding options, will automatically calculate the estimated monthly cost increase in a loan as a result of those options. Clearly, CFPB could have required something similar (reducing confusion) while eliminating burdens on small business.
[24] 77 Fed Reg. at 51,184.
[25] *Id.* at 51,185.

proposal."[26] Instead, machine readable is "a format where the individual data elements comprising the record can be transmitted, analyzed, and processed by a computer program, such as a spreadsheet or database program."[27] The Bureau states that "[c]reditors may be able to use existing recordkeeping systems to maintain the integrated disclosure data at no additional cost;"[28] however, it is the Committee's understanding that while machine readable technology exists, no off-the-shelf product exists and no information was included in the Proposed Rule showing that any business in the industry is using machine readable software.

The CFPB posits that there are benefits to industry by keeping records in an "electronic, machine readable format" including reducing costs by increasing efficiency, facilitating innovation in the financial services industry, and easing the burden of on-site examinations by allowing regulators to monitor compliance remotely.[29] The Bureau also states that "[a]ll of the benefits *may* reduce industry cost and burden in the *long run*, thereby reducing costs to consumers as well."[30] However, the CFPB does not provide an estimate of the *short run* cost and burden on industry that may be passed onto consumers. Nor is there any evidence that costs in the long run will be reduced. Furthermore, in the summary of the Proposed Rule, the only reason that CFPB states for this requirement is "[t]his will make it easier for regulators to monitor compliance."[31] Finally, if the purpose of the Proposed Rule is to benefit consumers, CFPB has not demonstrated how keeping information in spreadsheets or databases that may be inscrutable to consumers is at all helpful to them.

The CFPB is proposing to exempt a class of small creditors[32] from this requirement because it recognizes that "[t]he upfront and ongoing costs of such a requirement on small creditors may outweigh any benefits."[33] However, the CFPB fails to provide any cost estimate for the recordkeeping requirement for small creditors that do not have electronic filing systems or vendor software, even though it acknowledges that the burden may be "significant."[34]

While the CFPB should be commended for being willing to exempt some amorphous group of small businesses, even that creates problems. There would then be two sets of records (one for large and one for small businesses); those records might not be compatible, leading to difficulties in consumers obtaining information; and two sets of records might increase problems with securitization of mortgages and tracking who really owns the right to receive loan payments. The CFPB rightly is working on rules to ameliorate these problems; yet, this would exacerbate those problems. Uniformity in recordkeeping is an appropriate goal. However, that uniformity must be achieved without unduly burdening small businesses. The CFPB proposal simply fails to do that. Had the agency done a better job of obtaining small business input in the SBAR Panel, it might have avoided the problems with the proposed 12 C.F.R. § 1026.25.

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[26] *Id.*
[27] *Id.*
[28] *Id.* at 51,184.
[29] *Id.* at 51,186.
[30] *Id.* (emphasis added).
[31] *Id.* at 51,117.
[32] The CFPB does not define what class(es) of small creditors should be exempted; instead, it solicits input on the appropriate threshold, institution size or the number of loans originated. *Id.* at 51,186.
[33] *Id.* at 51,186.
[34] *Id.* at 51,287.

c. Three-Day Rule for the Provision of Closing Disclosure (Proposed 12 C.F.R. § 1026.19)

The CFPB is proposing to amend § 1026.19 of Regulation Z to require that the Closing Disclosure be provided to consumers at least three business days before the closing. If any changes occur after the Closing Disclosure is provided, the consumer must be provided with a revised Closing Disclosure and given an additional three business days to review the form before the consumer closes on the loan.[35] Under statute and current regulations, creditors are required to provide the TILA disclosures three business days before the transaction is completed. Conversely, settlement agents are only required to provide the RESPA settlement statement one business day in advance of the closing.[36]

The CFPB proffers limited exceptions to the proposed three-day rule. One would involve changes resulting from negotiations between the buyer and seller after the final walk-through. Another would exempt minor changes that result in less than $100 in additional costs.[37] Finally, the Proposed Rule incorporates an already extant exception that allows consumers to waive or modify the timing disclosure for a "bona fide personal financial emergency,"[38] but it is unclear what the scope of this exception entails or how consumers might seek to apply it.

Small creditors and settlement agents are concerned that because changes often occur shortly before closing, it may not be possible to meet this timeline,[39] the exceptions may be too narrow, and the three-day rule may have significant unanticipated consequences for consumers. When closings are delayed, there is a risk of damage to the consumer. Delays could result in an interest-rate lock expiring, a real estate contract expiring, or a breach of contract between the buyer and seller resulting in the loss of the house or down payment or both.[40] It could also affect other consumer arrangements such as scheduling movers, travel, and temporary housing arrangements.

Delays and changes to arrangements may result in increased costs to consumers that are greater than the increased costs that required the creditor to provide an additional three-day waiting period. Given the panoply of potential situations consumers may face in closing a real estate transaction, inflexible bright line rules may not be helpful to them. If the CFPB is trying to ensure smooth, informed real estate transactions, this part of the Proposed Rule is unlikely to achieve the agency's objective. Rather, CFPB should work with lenders, consumers and others involved in the settlement to derive a reasonable timing of disclosures that protects consumers without imposing seemingly arbitrary burdens on sellers, buyers, lenders, and settlement agents.

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[35] *Id.* at 51,117.

[36] *Id.* at 51,175.

[37] *Id.* CFPB provides little rationale for selecting $100. For a $100,000 transaction, $100 might be considered de minimis. For a $1,000,0000 transaction, $1,000 might be considered de minimis.

[38] 77 Fed. Reg. at 51,178.

[39] SBAR Panel Final Report, *supra* note 20, at 23-24.

[40] *Id.* at 35.

d. Provision of the Closing Disclosure (Proposed 12 C.F.R. § 1026.19)

Prior to the passage of the Dodd-Frank Act, TILA and RESPA required different parties to provide the final disclosures to consumers. Section § 1419 of the Dodd-Frank Act amended TILA by adding 15 U.S.C. § 1638(a)(17) to make creditors responsible for disclosing settlement cost information. The Proposed Rule considers two alternative approaches for assigning responsibility of providing the closing disclosure.

The CFPB believes that assigning this responsibility solely to the creditor (Alternative 1) will likely place increased costs on small creditors, including one-time legal fees and the need to hire additional staff to handle the increased workload.[41] Alternative 1 would shift the workload from settlement agents, who currently deliver final RESPA disclosures, to lenders. The CFPB acknowledges that this will change the role of settlement agents but does not attempt to analyze the impact that this will have on the economics of the settlement agent industry. Instead, the agency simply states that "[s]ettlement agents play a unique role in working through local real estate transaction requirements and practices, which creditors may be unlikely to take on."[42]

The other alternative, assigning the responsibility of providing the Closing Disclosure jointly to both the creditor and settlement agent (Alternative 2), will require increased coordination. Under Alternative 2, the TILA-required information will be prepared by the lender and the RESPA-required information will be prepared by the settlement agent. Lenders and settlement agents currently coordinate in the closing process so the coordination process will need to be changed due to the new forms and timing requirement, which may entail additional costs.[43] However, since the liability for disclosing settlement cost information has been shifted to the lender, it is unclear how the lender will opt to coordinate the settlement process with the settlement agent. Finally, CFPB made no estimate of the potential cost changes that might be incurred as the result of Alternative 2.

It is clear that the role of settlement agents could change significantly if the CFPB decides to proceed with Alternative 1, potentially resulting in consolidation within the industry that may negatively affect consumers through long-run higher costs as a result of reduced competition. However, because the CFPB failed to analyze the impact of either alternative on small settlement agents, it is unclear which alternative is less burdensome to small businesses and which alternative is most beneficial to consumers. CFPB should examine these costs and see whether there are other alternatives that improve disclosure document distribution to consumers without imposing unnecessary short or long run costs on settlement agents.

III. Conclusion

Several provisions of the TILA-RESPA Rule appear likely to increase opacity, complexity and costs of mortgage-financed real estate transactions while negatively affecting small businesses with no commensurate benefit provided to consumers. Had the CFPB thoroughly analyzed the impacts and costs of the Proposed Rule, the unintended consequences of these provisions would have

[41] 77 Fed. Reg. at 51,276.
[42] *Id.*
[43] *Id.*

become apparent and the alternatives offered would lessen the impacts on small businesses while better protecting consumers.

As the Chairman of the Committee, I encourage CFPB to revise and supplement its IRFA and consider republishing the IRFA for public comment before conducting a final regulatory flexibility analysis. Additionally, I echo the FTC's comments and encourage the CFPB to conduct quantitative testing of the proposed integrated disclosures before finalizing the TILA-RESPA Rule.[44] Please include these comments for the record. Should you have any questions about these comments, please do not hesitate to contact Viktoria Ziebarth or Barry Pineles of the Committee staff at 202-225-5821.

Sincerely,

Sam Graves
Chairman

cc: Boris Bershteyn, Acting Administrator, Office of Information and Regulatory Affairs

[44] Letter from FTC Bureau of Consumer Protection, Bureau of Economics, and Office of Policy Planning to the CFPB, In the Matter of Request for Comment on Notice of Proposed Rulemaking: Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) Docket No. CFPB-2012-0028 (Sept. 25, 2012), *available at* http://www.ftc.gov/os/2012/09/1209cfpbmortgagedisclosures.pdf.